

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SALES TAX REFERENCE No. 1 of 1995For Approval and Signature:**HONOURABLE MR.JUSTICE ANIL R. DAVE**

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HONOURABLE MS. JUSTICE R.M.DOSHIT

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to civil judge ?
- =====

COMMISSIONER OF SALES TAX - Applicant(s)**Versus****BHARUCH TEXTILES MILLS LTD. - Respondent(s)**Appearance :

MR VM PANCHOLI AGP for Applicant

SERVED BY RPAD - (N) for Respondent

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE**and****HONOURABLE MS. JUSTICE R.M.DOSHIT****Date : 16/01/2006****ORAL JUDGMENT** (Per : HONOURABLE MS. JUSTICE R.M.DOSHIT)

This Reference made by the Sales Tax Tribunal,
Ahmedabad [hereinafter referred to as, "*the Tribunal*"]

under Section 69 of the Gujarat Sales Tax Act, 1969 [hereinafter referred to as, "***the Act***"] arises from the judgment and order dated 24th September, 1992 passed by the Tribunal in Second Appeal No. 156 of 1988. The Tribunal has referred the following question:-

"Whether on the facts and in the circumstances of the case, the Gujarat Sales Tax Tribunal was right in law in partially allowing the second appeal no. 156 of 1988 by holding that opponent will not be required to pay tax applicable on sales of stores and chemicals iron strips, coal ash and miscellaneous item totalling Rs. 682652=30 in cash and such sales shall be treated as exempted sales under the provisions of entry 118 (3) of the Government Notification issued under section 49 (2) of the Act and amount of tax applicable for such sales shall be taken into aggregation for the purposes of computing limit of exemption and setting aside corresponding interest thereon and also setting aside the order of remand in so far as the rate of tax was concerned."

The following question is referred to this Court at the instance of the respondent-dealer :-

"Whether on the facts and in the circumstances of the case and in view of the recent decision of the Supreme Court in the case of M/s. J.K Synthetics Limited [1994 STC 422], interest will be payable upto the date of assessment under section 47 (4A) of the Gujarat Sales Tax Act, 1969 on the extra demanded amount of tax which arises on assessment ?"

The respondent [hereinafter referred to as, "***the***

dealer"] is a Company incorporated under the Companies Act, 1956. It is a dealer registered under the Act. The dealer was engaged in manufacturing and sale of textiles. During the year 1983-84, the dealer had made sale of surplus iron strips, burnt coal and other waste products like scrap, drums, etc. [hereinafter cumulatively referred to as, "**the waste products**"] and had earned turnover of Rs. 7,47,521/= from the said sales. The dealer claimed that the said turnover was not exigible to tax under the Act. The Assessing Officer did not accept the claim made by the dealer. The dealer was charged sales tax on the sale of the waste products. Pursuant to the said order of assessment, the dealer was called upon to pay tax and interest to the extent of Rs.96,563/=. Feeling aggrieved, the dealer preferred Appeal before the appellate authority. Before the appellate authority, the dealer challenged, *inter alia*, levy of tax on sale of the waste products and recovery of interest under Section 47 (4A) of the Act.

The appellate authority held that the sale of the waste products was exigible to tax. The appellate authority was, however, of the opinion that levy of tax at a uniform rate was erroneous and that the sale of each product shall be liable to tax at the rate mentioned in

the relevant entry. Accordingly, the appellate authority remanded the matter to the assessing officer.

Feeling aggrieved, the dealer preferred above referred Second Appeal No. 156 of 1988 before the Tribunal. Before the Tribunal, the dealer conceded that the sale of the waste products was exigible to tax but, according to the dealer, the dealer was the beneficiary of the incentive scheme and was exempted from the payment of sales tax. The tax payable on sale of the waste products also should be included in the aggregate tax liability of the dealer to be computed against the exemption limit. The dealer also challenged the order of remand on the ground that what the dealer challenged before the appellate authority was imposition of tax on sale of the waste products and not the rate at which the tax ought to be levied.

The Appeal was contested by the Revenue. According to the Revenue, the exemption from payment of sales tax granted to the dealer was in respect of the tax liability on sale of "**manufactured goods**". The waste products could not be said to be the "**manufactured goods**". The tax leviable on such sale should not, therefore, be included in the total tax liability for computation against the

exemption limit.

The Tribunal has considered the definition of the word "**business**" and has relied upon the judgment of the Hon'ble Supreme Court in the matters of **Commissioner of Sales Tax, Bombay vs. Bharat Petroleum Corporation Limited** [AIR 1992 SC 959] and of **State of Gujarat vs. Raipur Manufacturing Company Limited** [(1967) STC 1] to hold that the sale of waste products was also the business of the dealer and the income earned from such sale was income from the business.

As to the interest, the Tribunal has noted that, "**..As far as the amount of interest payable on the remaining amount of tax is concerned, the appellant has not pressed this claim in view of the decision of the Gujarat High Court in M/s. Ashapura Metal [sic Mineral Company vs. The State of Gujarat & Anr. decided on 20/1/1992 and so, as far as that aspect is concerned, this appeal is required to be dismissed.**"

Accordingly, the Tribunal has allowed the Appeal partially. It has been held that, "**..The appellant would not be required to pay tax applicable on sales of stores and chemicals, iron strips, coal ash and miscellaneous**

items totalling Rs. 6,82,652=98p. in cash. The sales shall be treated as exempted sales under the provisions of entry 118 (3) of the Government Notification issued under section 49 (2) of the Act and the amount of tax applicable to such sales shall be taken into aggregation for the purpose of computing the limit of exemption granted to the appellant. The corresponding interest on such amount of tax is also set-aside."

What is relevant for the decision on the present Reference is Entry 118 (3) of the Government Notification issued under Section 49 (2) of the Act. Section 49 of the Act provides for exemptions. Sub-section 2 thereof empowers the State Government to exempt any specified class of sale or of purchases from payment of whole or any part of the tax payable under the Act, on such conditions as it may impose by notification in the Official Gazette. Entry 118 was added by Notification dated 5th February, 1981. The relevant clause 3 of the said Entry 118 allowed exemption from whole of the tax on **"sales by specified manufacturer of goods manufactured by him"** on the terms and conditions mentioned therein. It is not in dispute that the dealer was a specified manufacturer and was exempted from whole of the tax on sale of goods manufactured by it. Hence, in our view,

what falls for our consideration is whether the waste products could be said to be "***the goods manufactured by the dealer***". The above referred judgments relied upon by the Tribunal deal with the term "***business***". In the said matters before the *Hon'ble* Supreme Court, the question was whether the concerned dealer could be said to have business in the products which were either by-products or the waste products of the manufacturing process. In the said judgments, the *Hon'ble* Supreme Court held that the sale of by-products or waste products which were regularly produced and sold shall also be considered the business of the concerned dealer. However, the question here is not whether or not it was the business of the dealer to sell the waste products. The question is whether the waste products could be said to be the goods manufactured by the dealer. We are thus called upon to decide whether the aforesaid waste products were the "***goods manufactured by the dealer***". It is not shown by leading evidence that any of the aforesaid waste products except the coal ash was the outcome of the manufacturing process either as a by-product or as a waste product. They were the goods which had been rendered unserviceable. Hence, the waste products in the hands of the dealer. We are, therefore, of the opinion that the

Tribunal has erred in not applying the correct test and in holding that the tax on sale of the waste products was required to be included in the total tax liability of the dealer and to be included for the purpose of computation of exemption limit. In our opinion, the amount of tax payable on sale of the waste products except the coal ash [*a waste product of the manufacturing process*] was required to be paid by the dealer. The amount of such tax could not to be included in the total tax liability for the purpose of computation of the exemption limit.

We, therefore, answer the Question No. 1 in negative, in favour of the Revenue and against the dealer to the above extent.

The question of liability to pay interest has to be considered under Section 47 [4A] as it then stood. The same read as under :-

[4-A] If a dealer does not pay amount of tax within the time prescribed for its payment under sub-section (1), (2) or (3) or on or before the date specified in a notice issued under sub-section (4) in respect of the amount of tax falling under sub-clause (ii) of clause (a) thereof, there shall be paid by such dealer for the period commencing on the date of expiry of the aforesaid prescribed time or the specified time or the specified date and ending on the date of payment of the amount of tax, simple interest at the rate of twenty four per cent per annum on the amount of tax not so paid or on any less amount thereof remaining unpaid during such

period.

Provided that where a penalty is levied under sub-section (6) of Section 45 in respect of the difference and the period referred to in that sub-section, no interest shall be payable under this sub-section on such difference for such period.

Sub-section 4A of Section 47 of the Act provided for recovery of interest from a dealer who did not pay amount of tax within the time prescribed for its payment or on or before the date specified in a notice issued under sub-section 4. Such dealer was made *liable to pay interest at the specified rate "for the period commencing on the date of expiry of the prescribed time or the specified time or the specified date and ending on the date of payment of the amount of tax."* The aforesaid provision contained in sub-section 4A was similar to the provisions which were under consideration before the Hon'ble Supreme Court in the matter of ***Associated Cement Company Limited vs. Commercial Tax Officer, Kota & Ors.*** [1981 (48) STC 466]. The Tribunal, while deciding the Second Appeal has relied upon the judgment of this Court in the matter of ***Ashapura Mineral Company*** [1992 GSTB I/92] in which this Court had followed the judgment of the Hon'ble Supreme Court in the above referred matter of Associated Cement Company Limited. The majority view

expressed in the said judgment through *E.S Venkataramiah, J.* held the field till the said judgment was reconsidered by the Constitutional Bench of the *Hon'ble* Supreme Court in the matter of J.K Synthetics Limited [1994 STC 422]. In the matter of J.K Synthetics Limited [*Supra*], the Constitutional Bench of the *Hon'ble* Supreme Court speaking through *A.M Ahmadi, J.* Reversed the majority view expressed in Associated Cement Company Limited [*Supra*] and affirmed the minority view expressed by *Bhagwati, J.* The judgment of the *Hon'ble* Supreme Court in the matter of J.K Synthetics Limited [*Supra*] deals with the question as to the date from which the interest shall be payable on unpaid amount of the sales tax. The question "*until which date such interest shall be payable*" was not the matter at issue before the *Hon'ble* Supreme Court either in the matter of J.K Synthetics Limited [*Supra*] or in the matter of Associated Cement Company Limited [*Supra*]. The question raised in the present Reference is answered by sub-section 4A which is under consideration. Sub-section 4A provided in no uncertain terms that the interest shall be payable under that sub-section from the date commencing on the date of expiry of the prescribed time or the specified time or the specified date and *ending on the date of payment of*

amount of tax. Thus, the date of commencement of the period for which the interest became payable would vary from case to case depending upon whether the tax remained unpaid as specified under sub-section (1), (2) or (3) or under sub-section (4) of Section 47 of the Act but the date of termination of such period in all cases was the same i.e. the date on which unpaid tax was actually paid. The claim of the dealer that such interest shall be payable till the date of the order of assessment is contrary to the above referred statutory provisions and requires to be negatived.

The statement of case drawn by the Tribunal does not state the period for which and the amount on which the interest was recovered from the dealer. In absence of such details before us, we are unable to say whether or not interest was correctly levied upon the dealer. However, suffice it to say that the claim that the interest on unpaid tax shall be payable till the date of assessment order is unsustainable. The interest on the amount of tax which remained unpaid shall be payable from the date commencing on the date of the expiry of the specified date and ending on the date of payment of the amount of tax demanded.

We answer the question no.2 accordingly.

Reference stands disposed of in the above terms.

{A.R Dave, J.}

{Miss R.M Doshit, J.}

*Prakash**

The judgment in the matter of J.K. Synthetics Limited [1994 STC 422] deals with the question as to the date from which the interest shall be payable on unpaid amount of the sales tax. The question until which date such interest shall be payable was not the matter at issue before the Hon'ble Supreme Court either in the matter of J.K Synthetics Limited [Supra] or in the matter of Associated Cement Company Limited [Supra]. The question raised in the present Reference is answered by sub-section 4A which is under consideration. Sub-section 4A provides in no uncertain terms that the interest shall be paid under that sub-section for the year commencing from the prescribed time or the specified time or the specified date and "ending on the date of payment of amount of tax". Thus, the date of commencement of the period for which the interest is payable would vary from case to case depending upon whether the tax remained

unpaid as specified under sub-section (1), (2) or (3) or under sub-section (4) of Section 47 of the Act but the date of termination of such period in all cases shall be the same i.e. the date on which unpaid tax is actually paid. The demand of the dealer that such interest shall be payable for the period till the date of the order of assessment is contrary to the above referred statutory provisions and requires to be negatived.

... Under entry no. 118 (2) of the Government Notification issued under Section 49 (2) of the Act, sale of such waste products to the extent of Rs. 7,47,521/= was considered taxable and the dealer was called upon to pay tax of Rs. 30,104/= applicable to such sale. The dealer was also charged interest of Rs. 44,382/= under Section 47 [4A] of the Act. Feeling aggrieved, the dealer preferred Appeal. The appellate authority did not record finding with respect to the interest payment under Section 47 [4A] of the Act and ordered remand of the matter for re-assessment of tax on sale of scrap and waste products. The said order of appellate authority was challenged before the Tribunal in Second Appeal No. 156 of 1988. The Tribunal by its judgment and order dated 24th September, 1992 allowed the Appeal partially. Therefore, the present Reference. The Tribunal modified the order of

the appellate authority to the extent it held that the dealer was not required to pay tax applicable on sale of stores and chemicals, iron stripes, coal ash and miscellaneous items totalling Rs. 6,82,652=98p. The said sale was held to be exempt under the provisions of entry 118 (2) of the Government Notification issued under Section 49 (2) of the Act. It was further directed that the amount of tax payable on such sales shall be taken into aggregation for the purpose of computing the limit of exemption granted to the dealer.

Mr. Pancholi has submitted that the judgment of the Tribunal is self contradictory. Once the Tribunal had held that the sale of scrap and waste products is exempted under entry no. 118 (2) of Government Notification issued under Section 49 (2) of the Act, no tax would be payable on such sales. The question of aggregating the same for the purpose of computing limit of exemption [*granted under the incentive scheme*] shall not arise. He has submitted that the Tribunal has erred in holding that the sale of scrap and waste materials shall be exempt under entry 118 (2) of the Government Notification issued under Section 49 (2) of the Act. He has submitted that the business of the dealer was that of manufacturing and sale of textiles. The dealer had not

business in coal, iron, strips, drums, etc. The said materials were waste products of the manufacturing process of textile and textile yarn. Such waste products shall, therefore, be not exempted under entry 118 (2) of Notification issued under Section 49 (2) of the Act. In support of his submissions, Mr. Pancholi has relied upon the judgment of the Full Bench of Madhya Pradesh High Court in the matter of ***Hukumchand Mills Limited vs. Commissioner of Sales Tax, M.P*** [1988 (71) STC 101] and of Andhra Pradesh High Court in the matter of ***I.T.C Bhadrachalam Paperboards Limited vs. State of Andhra Pradesh*** [1988 (114) STC 58]. He has submitted that the above referred judgment of the Andhra Pradesh High Court is reversed by the *Hon'ble* Supreme Court in the matter of ***ITC Bhadrachalam Paper Boards Limited v. State of A.P*** [2002 (126) STC 541]. He has, however, distinguished the judgment of the *Hon'ble* Supreme Court and has submitted that the exemption granted by the State of Andhra Pradesh was not identical to the exemption granted by the State of Gujarat. The provision being not *para materia* identical, the observations made by the *Hon'ble* Supreme Court shall not apply to the facts of the present case.

Section 49 of the Act deals with exemptions. Sub-section 2 thereof empowers the State Government to exempt

any specified class of sales or of specified sales or of purchases from payment of whole or any part of tax payable under the Act on subject to such conditions as may impose. Under the said powers conferred by sub-section 2 of Section 49 of the Act, the State Government had issued a Notification. Relevant part of entry no. 118 (2) of the said Notification refers to, "***Sales of raw materials, processing materials, consumable stores or packing materials by a registered dealer to a specified manufacturer***" It is not in dispute that the above referred sale of scrap and waste products was made to a specified manufacturer. However, the submission is that the aforesaid scrap or waste products cannot be said to be raw materials, processing materials, consumable stores or packing materials. Such sale, therefore, cannot be claimed as exempt from sales tax under the above referred entry 118 (2). In the matter of **Hukumchand Mills Limited** [*Supra*], the Madhya Pradesh High Court held that the petitioner which carried on the business of selling cloth and yarn though was not liable to pay tax on sale of cloth was liable to pay tax on sale of unserviceable/miscellaneous items such as discarded machines, dyes, chemicals, broken iron hoops, coal ash and other materials. Similar is the view expressed by the

Andhra Pradesh High Court in the matter of ***I.T.C Bhadrachalam Paperboards Limited*** [Supra]. The appellant therein was a manufacturer of paperboards. With respect to sale of coal ash, the High Court held that, "***..The main products manufactured by the petitioner-company are paper and paperboards. "Coal ash" is only the leftover residue after burning the coal which was used as fuel for manufacturing paper and paperboards... ..Therefore, we are inclined to hold that the petitioner-company is not eligible for exemption of sale of "coal ash" under G.O. Ms. No. 606, dated April 9, 1981 as the "coal ash" is not a product of the petitioner-company.***" However, the Hon'ble Supreme Court in the matter of ***ITC Bhadrachalam Paper Boards Limited*** [Supra] reversed the judgment of the Andhra Pradesh High Court. The State of Andhra Pradesh had issued Order No. 606 under the Andhra Pradesh Sales Tax Act. Under the said Order, industrial products were made exempt from payment of sales tax. The Hon'ble Supreme Court held that the said order gave "***complete exemption to the products of the industry from sales taxes for a limited period of five years.***" It was held that, "***..the coal ash that is produced as a result of the burning of coal as fuel is a product of the appellant-industry though it might not be the principal product for***

which the industry was established."

We do agree with Mr. Pancholi. The Government Order No.606 issued by the Andhra Pradesh State granted exemption to an industrial products whereas in the case before us, the exemption granted under entry 118 (2) is confined to the sales of raw materials, processing materials, consumable stores and packing materials alone. Unless the materials in question fall within any of the aforesaid four categories, a dealer would not be entitled to claim exemption under the said entry. Here, the dealer claimed exemption on sale of scrap and waste materials, as stated hereinabove. None of the said materials fall within any of the four categories. The dealer, therefore, shall not be entitled to exemption under the aforesaid entry 118 (2).

In view of the above discussion, we answer the Reference in favour of the Revenue. The dealer was liable to pay tax on the sale of scrap and waste products. The rate at which the sales tax should be levied is not at dispute. The sales tax payable on such sales shall be aggregated for the purpose of exemption granted to the dealer under the incentive scheme.

*R*eference stands disposed of in the above terms.

{Anil R.M Dave, J.}

{Miss R.M Doshit, J.}

*Prakash**